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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

79-1761

No. _____

STATE OF NORTH CAROLINA

v.

WAYNE SEAY

Petitioner

~~On Appeal From The North Carolina Supreme Court~~

PETITION FOR WRIT OF CERTIORARI

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No. _____

STATE OF NORTH CAROLINA

v.

WAYNE SEAY

On Appeal From The North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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1. OPINIONS BELOW

The opinion of the North Carolina Court of Appeals affirming the convictions of Petitioner on two counts of embezzlement in the trial court, is attached as Exhibit A. The Order of the Supreme Court, dismissing Petitioner's Appeal as a matter of right based on constitutional issues and denying the Petition for Discretionary Review, is attached as Exhibit B.

2. JURISDICTION

The jurisdiction of this Court to review the decisions of the North Carolina Supreme Court and Court of Appeals is conferred by Title 28, United States Code, Section 1257(3). The Petitioner has preserved throughout this entire matter his constitutional challenge to the indictments.

3. QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's Sixth Amendment right to a speedy trial, via the Fourteenth Amendment, has been violated by a delay of nearly five years between the alleged criminal acts and actual indictments, when the delay resulted in irreparable prejudice to the preparation of his defense?

II. Whether Petitioner has been denied his constitutional rights to due process of law, via the Fifth and Fourteenth Amendments, where nearly five years elapsed between the alleged criminal acts and the indictments, Petitioner's defense was irreparably prejudiced, the State either intentionally or negligently failed to seek an indictment after knowing of the salient facts for nearly two years prior to seeking the indictment, and the District Attorney, testifying as a witness, misstated evidence prejudicial to Petitioner?

III. Whether the State must show a lack of prejudice to Petitioner's preparation of his defense to criminal charges when an inordinate and excessive delay of nearly five years transpired between the time of the alleged criminal acts and indictments, and, if so, whether the State has shown that Petitioner was not prejudiced by the delay?

4. CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES

Fifth (5th), Sixth (6th) and Fourteenth (14th) Amendments to the United States Constitution.

5. STATEMENT OF THE CASE

Petitioner, a resident of Winston-Salem, North Carolina, was secretary-treasurer of American Marketing Company, Inc., a North Carolina corporation, which was formed to develop real estate (Record, N.C. Court of Appeals, Page 14)*.

Mr. Roger Tise, a sales agent at that time for the company, had received a $500 investment from Mrs. Inez Poindexter (whom Petitioner learned several months later was the mother of Roger Tise), which Petitioner deposited in the corporate account (R.pp.14,15). Mr. Tise also received an investment from Mr. James Belton of $400. Mr. Belton's check was also deposited in the corporate account (R.p.15). Both of these transactions took place in early April, 1973.

Thereafter, a conflict between Mr. Tise and Mr. McLawhorn, president of the corporation, arose, because Mr. Tise wanted an advance on his commissions, which he alleged were due him (R.p.14).

Petitioner became ill in June, 1973, and was incapacitated for approximately six months (R.p.13). Because of Petitioner's physical condition and the possibility that he might not be able to develop the property, it was decided that it was not feasible to raise the money to develop the real estate.

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*A copy of the Record of the hearing on the Motion to Dismiss the indictments and the Trial Court's Order denying the Motion has been filed with the Office of the Clerk of the Supreme Court of the United States.

A check for $500 was made to Roger Tise to pay back Mrs. Poindexter (R.p.15). Mr. Tise was also instructed to return Mr. Belton his $400, and Petitioner took a receipt from Mr. Tise for same.

Because of Petitioner's health and the inability of the company to proceed with the projects, the company became inactive, and the lessor of the space rented by the company took possession of all the assets which were located in the office, including the books and records of the corporation (R.p.13). Petitioner made an effort thereafter to recover the books and records, and went to the office of the management company in control of the space leased by the corporation, but he was unable to recover any of the books and records (R.pp.13,14).

In February, 1976, Inez Poindexter contacted the Attorney General's Office about the money she had paid to American Marketing (R.p.23). She also wrote the office of the Secretary of State and told the officials there the circumstances surrounding the investment. She received correspondence from the Attorney General's office dated April 8, 1976, and later, correspondence from the Secretary of State's Office (R.p.21).

In September, 1976, Mrs. Poindexter contacted the District Attorney's Office in Forsyth County, North Carolina, and thereafter had a meeting with the District Attorney in September, 1976, and several telephone conversations concerning the investment (R.pp.21,22).

Two bills of indictment were returned on February 27, 1978 (R.pp.3-5) by the Forsyth County Superior Court (Winston-Salem) alleging that Petitioner embezzled the investments of Inez Poindexter and James Belton. (Prior to trial, counsel then representing Petitioner filed

a Motion to Dismiss the indictments, alleging violations of Petitioner's Federal and State constitutional rights (R.pp.11-12), because of the inordinate and undue delay between the alleged criminal acts and the indictments and the prejudice suffered by Petitioner because of the delay, among other reasons.)

The trial court denied Petitioner's Motion to Dismiss and found that the prosecution did not deliberately and unnecessarily cause delay for its convenience or any advantage of the State (R.pp.43,44).

Petitioner was tried and convicted on both counts of embezzlement and sentenced to sixty (60) days active time. His conviction was affirmed on appeal to the North Carolina Courts (see appendices A and B).

6. ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

I. Whether Petitioner's Sixth Amendment Right To A Speedy Trial, Via The Fourteenth Amendment, Has Been Violated By A Delay Of Nearly Five Years Between The Alleged Criminal Acts And Actual Indictments, Where The Delay Resulted In Irreparable Prejudice To The Preparation Of His Defense?

Petitioner contends that he is entitled to the Sixth Amendment guarantee to a speedy trial, via the Fourteenth Amendment, and that this right was violated because of the delay of nearly five years between the alleged criminal acts and actual indictments, which delay resulted in the irreparable damage to Petitioner's presentation of his defense.

Petitioner is aware of this Court's opinion in *United States* v. *Marion,* 404 U.S.307, 30 L. Ed. 2nd

468, 92 S. Ct. 455 (1971), but stresses that in that case defendant neither demonstrated nor explained specific prejudice because of the delay. Moreover, this court cited as a basis for its decision the fact that defendants are protected from extreme pre-indictment delays by statutes of limitation. But North Carolina has no statute of limitation on felony cases. For these reasons, this case is not dispositive of the issue in the case at bar.

Petitioner contends that the word "accused" was not intended by the drafters of the Sixth Amendment to limit the constitutional guarantee of a speedy trial to ones formally charged. In support of that assertion, Petitioner would show the Court:

A. The right to a speedy trial is an important safeguard to limit the possibility that long delay will impair the ability of an accused to prepare a defense. *United States* v. *Ewell,* 383 U.S. 116, 120 (1966).

Although certainly not binding on this court, the reasoning of former North Carolina Chief Justice Susie Sharp, a highly respected jurist, in *State* v. *Johnson,* 275 NC 264, 167 SE2d 274 (1969), on this issue is instructive: After noting that the guarantee of a speedy trial imposes the only limitation upon purposeful and oppressive delay between the date of the felonious offense and the commencement of the prosecution, Justice Sharp, writing for the court, stated, 275 at

> "We can see little, if any, difference in the dilemma which unreasonable delay creates for the suspect who was belatedly charged, the accused named in a warrant promptly issued but belatedly served, and the indicted defendant whose trial has been unduly postponed. The same considerations which impel prompt action in the one situation are equally critical in the others. 'Indeed, a suspect may be at a

> special disadvantage when complaint or indictment or arrest, is purposefully delayed. With no knowledge that criminal charges are to be brought against him, an innocent man has no reason to fix in his memory the happenings on the day of the alleged crime. Memory grows dim with the passage of time. . .' *Nickens* v. *United States, supra,* 323 F.2d at 813 (concurring opinion)."

B. The Constitution is a document purposely brief, and the rights sought to be protected therein are sometimes subject to inpermissible limitations because of the difficulty in translating into a few words the scope of the right to be protected. Such is the case with the right to a speedy trial under the Sixth Amendment. That right is guaranteed to an "accused", and while a limited interpretation of that word is that one must be formally charged before that right can be invoked, such an interpretation discounts the argument that, assuming the Amendment seeks to protect anyone who has the standing to complain of prosecutorial delay in seeking an indictment, which Petitioner argues that it most certainly does, what other satisfactory language could have been used, considering the drafters' conceptual adherence to brevity?

C. Historically, British Courts did consider delay as a condition to issuance of an information.

The criminal prosecution, procedurally, was commenced by the filing of a lawsuit, and thereafter the filing of an application for a criminal prosecution or a rule nisi for similar procedure calling for the defendant to show cause why he should not be imprisoned. Thus in the English common law, an individual charged as the defendant in a criminal proceeding could and would be an "accused" prior to formal indictment. *United States* v. *Marion, supra* (Douglas, J., concurring opinion).

This Court held in *Dellingham* v. *United States,* 423 U.S. 64, 46 L. Ed. 2d 205, 96 S. Ct. 303 (1975), that a defendant after arrest was an "accused", and a delay of 22 months between arrest and indictment could be considered on this issue. Petitioner would argue that when the State starts building its case against a defendant and focuses the full investigatory and prosecutorial powers of the State against the defendant, the defendant should be considered accused for the purposes of the Sixth Amendment.

D. Since the power to indict rests with the State, it controls when a cause might be submitted to the Grand Jury and when a formal charge against an individual can be made. To limit the vesting of an individual's right to a speedy trial to that point allows the State to circumvent completely that right by purposely delaying its submission of its case to the Grand Jury. Certainly this was not contemplated by the drafters of the Bill of Rights.

E. In *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. Ed. 694, 86 S. Ct. 1602 (1966), this Court ruled that an individual, prior to formal charges, must be informed of the Sixth Amendment rights accorded to an "accused". This opinion clearly recognizes that an "accused", under the Sixth Amendment, is not merely one who is formally charged but clearly envelopes a large spectrum of individuals subject to the investigatory and prosecutorial powers of the State.

In the case at bar, nearly five years elapsed between the alleged criminal acts and the indictment. As a result of the delay, Petitioner was irreparably damaged in that documentary evidence necessary to his defense was destroyed in the interim. Moreover, the record indicates that the State was aware of the complaints by the pro-

secuting witnesses for two years prior to seeking an indictment. The State, therefore, either intentionally or negligently failed to seek an indictment for a constitutionally inpermissible period of time.

These facts are to be distinguished from *United States* v. *Lovasco*, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977), where this Court presumed good cause for delay and noted protection via statutes of limitation. Petitioner does not believe such good cause can be ascribed to the District Attorney on this record, and, as noted, the statute of limitation affords this Petitioner no protection.

To summarize, Petitioner contends that the Sixth Amendment right to a speedy trial applies to preindictment delay where a defendant's rights are prejudiced thereby, and that that right has been violated because of the inordinate delay of nearly five years between the alleged criminal acts and indictment, the prejudice to Petitioner because of that delay, and the State's intentional or negligent delay for nearly two years in seeking an indictment.

II. Whether Petitioner Has Been Denied His Constitutional Right To Due Process Of Law, Via The Fifth And Fourteenth Amendments, Where Nearly Five Years Elapsed Between The Alleged Criminal Acts And The Indictments, Petitioner's Defense Was Irreparably Prejudiced, The State Either Intentionally Or Negligently Failed To Seek An Indictment After Knowing Of The Salient Facts For Nearly Two Years Prior To Seeking Indictment, And The District Attorney, Testifying As A Witness, Misstated Evidence Prejudicial To Petitioner?

Petitioner contends that a delay of nearly five years between the alleged criminal acts and the indictments, coupled with irreparable prejudice to Petitioner's defense, and the intentional or negligent delay of the State to seek an indictment after knowing of the salient facts for nearly two years prior thereto, violated his right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.

Clearly, the thrust of many of the constitutional guarantees afforded one ultimately charged with a criminal offense is the preparation of an adequate defense. (Sixth Amendment, United States Constitution). In all cases, excessive delay between the time of the alleged criminal acts and the trial hampers the effective presentation of testimony concerning words spoken and conduct taken. In cases involving alleged acts of embezzlement such as the case at bar, necessarily dependent upon the presentation of documentary evidence, one's difficulty in presenting an effective defense is compounded by the fact that the necessary documentary evidence is often destroyed when there is considerable delay between the alleged criminal acts and the trial. Such is the case at bar.

The State of North Carolina no doubt will contend that Petitioner's documentary evidence was destroyed before it was aware of the facts which ultimately led to Petitioner's indictment. But Petitioner would argue that nearly three and one-half years elapsed between the time of the alleged criminal acts and when Petitioner was contacted by the local District Attorney. Surely no businessman should be expected to maintain business records for that long period of time after business had ceased operations in the anticipation that a District At-

torney would suddenly take an interest in alleged "white collar crimes" and seek to prosecute him nearly five years after the alleged criminal acts. This Petitioner has no statute of limitations to protect him.

Petitioner also argues that the State either intentionally or negligently failed to present its case to the Grand Jury until nearly two years after learning of the salient facts, and the District Attorney, while testifying as a witness, misstated evidence to the jury which prejudiced Petitioner.

Donald K. Tisdale, the District Attorney in Forsyth County, North Carolina, where the case was tried, testified at the trial on the merits (R.pp.80-83), although perhaps the more prudent course would have been to withdraw his staff from prosecution of the case. Mr. Tisdale testified that he had talked with Petitioner by telephone and that he had found his telephone number in the telephone book (R.p.83). Yet the uncontradicted evidence is that Petitioner *never* had his phone number listed in the telephone book.

Mr. Tisdale also testified that Petitioner told him he owed the money to Mrs. Poindexter and that he would pay it back, which testimony directly contradicts Petitioner's defense.

While Mr. Tisdale's misstatement appears minor, the Court must know that the jury accorded his testimony great weight, and the District Attorney's willingness to testify falsely as to this fact and otherwise playing "fast and loose" with the facts, quite obviously could have affected the jury's verdict. Because of the significant prejudice to Petitioner, Petitioner believes he has not been accorded due process of law. *See Mooney* v. *Holohan,* 294 U.S. 103, 79 L. Ed. 791. 55 S. Ct. 340

(1935) and *Pyle* v. *Kansas,* 317 U.S. 213, 87 L. Ed. 214, 633 S. Ct. 177 (1942).

In summary, Petitioner's right to due process of law, as is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, was violated because of the inordinate delay of nearly five years between the alleged criminal acts and indictments, the prejudice suffered to Petitioner by the delay, the State's intentional or negligent failure to present its case to the Grand Jury for nearly two years after learning the salient facts, and the District Attorney's misstating of the evidence.

III. Whether The State Must Show A Lack Of Prejudice To Petitioner's Preparation Of His Defense To Criminal Charges When An Inordinate And Excessive Delay Of Nearly Five Years Transpired Between The Time Of The Alleged Criminal Acts And Indictments, And, If So, Whether The State Has Shown That Petitioner Was Not Prejudiced By The Delay?

A delay of four years or more in securing an indictment, nothing else appearing, is an unusual and undue delay. *United States* v. *Lustman,* 258 F. 2d 475 (2d Cir. 1958), *cert. denied,* 358 U.S. 880, 3 L. Ed. 2d 109, 79 S. Ct. 118 (1958). A delay of seven months prior to bringing charges has been held an inpermissible period. *Ross v. United States,* 121 U.S. App. D.C. 233, 349 F. 2d 210 (1965).

Petitioner contends that the Due Process Clause of the Fifth Amendment, and the Sixth Amendment, via the Fourteenth Amendment, require the State to have the burden of proof to establish that the unusual and undue delay between the alleged criminal acts and the

indictments is not prejudicial to Petitioner, and that the State has not made that showing on this record. Petitioner believes that the State should have the burden of proving lack of prejudice to discourage and prevent the State from deliberately and intentionally delaying the presentation of its case to the Grand Jury.

While Petitioner recognizes that any arbitrary standard denies the court some flexibility in this area, Petitioner would contend that if a lapse of four years between the alleged criminal acts and indictments is, on its face, an unusual and undue delay, Petitioner should not have to bear the burden of showing the absence of prejudice.

7. CONCLUSION

For the foregoing reasons, Petitioner believes his Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

EXHIBIT A

COURT OF APPEALS OF NORTH CAROLINA

No. 7921SC647

STATE OF NORTH CAROLINA

v.

WAYNE SEAY

Dec. 18, 1979

Defendant was charged in two bills of indictment with embezzlement of funds from Inez Poindexter and James Belton. In April, 1973, James Belton, Inez Poindexter and at least one other were solicited by Roger Tise to make investments in Salem Properties, a limited partnership, which would be formed once sufficient capital was raised and which would make investments in real property. The general partner for this limited partnership was to be American Marketing Corporation. Robert McLawhorn was president and defendant was secretary-treasurer of the general partner corporation. Tise was hired and trained by McLawhorn to solicit capital for the limited partnership. The evidence is in dispute on whether his compensation was to be a salary with a 10% commission for sales or a straight 10% commission. He did receive one check for $500.00 which was designated a "commission advance" and which was drawn on Intercapital Corporation of which defendant was president and McLawhorn was secretary-treasurer.

Poindexter and Belton were provided with subscription letters, power of attorney forms and copies of a partnership agreement for Salem Properties which designated American Marketing Corporation as general partner. Partnership subscriptions were in $100.00 units, and the agreement of partnership was not to become effective or to be recorded with the register of deeds until a minimum of $50,000.00 in capital was raised. The agreement also provided that "[t]he general partner agrees that it will, in the name of the partner-

ship, jointly open and thereafter maintain in a North Carolina bank a bank account or accounts in which shall be deposited all contributions of the partners and all other partnership income and that it will use such funds solely for the business of the partnership." Poindexter contributed $500.00 on 6 April 1973 and Belton contributed $400.00 on 2 April 1973 to the Salem Properties investment explained to them by Tise. Both delivered checks to Tise made payable at his instructions to "American Marketing Corporation, General Partner." Both checks were delivered by Tise to defendant. The checks were cashed and endorsed "For deposit only, American Marketing Corporation by Wayne Seay." Tise was fired shortly after these solicitations were made.

In the latter part of 1973, Poindexter began inquiring of defendant about her investment. She was given his phone number by Tise who was her son. She called him every month or so about returning the money and was given assurance that he was working on everything and would "get things a-goin'." In March or April, 1975, Tise talked with Seay about the investments and was assured that they were safe but not reachable. In February, 1976, Poindexter consulted an attorney and made a written complaint to the Attorney General in Raleigh. In September, 1976, she saw the district attorney for the twenty-first judicial district. The district attorney wrote defendant a letter and defendant responded by phone in November, 1976. Defendant acknowledged receipt of the money and gave excuses of ill health and promised to repay in thirty days. Belton and Poindexter hired an attorney who also reached defendant. He told their attorney he was financially unable to repay at that time but promised to contact the attorney again within a week about the matter. He never did. The SBI began an investigation in 1977. A limited partnership known as Salem Properties with the general partner being American Marketing Corporation was never registered nor formally created. Poindexter and Belton were never reimbursed nor repaid for their contribution. Indictments were brought against defendant on 27 February 1978 for embezzlement from Poindexter and Belton.

Defendant presented evidence through the testimony of Robert McLawhorn that he and defendant concluded after firing Tise that the investment solicitations made by Tise which totaled $1,000.00 should be returned. They accordingly sent Tise a letter instructing him to use the commission advance to repay Poindexter, his mother. The letter contained $500.00 in cash with which he was to reimburse Belton and another subscriber for their contributions to the Salem Properties venture.

The jury returned verdicts of guilty and judgments were entered thereon. Defendant appeals.

Atty. Gen. Rufus L. Edmisten, by Sp. Deputy Atty. Gen. David S. Crump, Raleigh, for the State.

Morrow, Fraser & Reavis by John F. Morrow, Winston-Salem, for defendant-appellant.

VAUGH, *Judge*

Defendant first assigns error in the denial of his pretrial motion to dismiss for denial of his right to a speedy trial embodied in the Sixth Amendment of the United States Constitution applicable to the states through the Fourteenth Amendment and the Eighteenth Section of the First Article of the North Carolina Constitution. Almost five years had passed from the alleged embezzlements in April, 1973 until the 27 February 1978 indictments.

Such a long period of time, nothing else appearing, constitutes unusual and undue delay.

> "[W]hen there has been an atypical delay in issuing a warrant or in securing an indictment and the *defendant shows* (1) that the prosecution deliberately and unnecessarily caused the delay for convenience or supposed advantage of the State; and (2) that the length of delay created a reasonable possibility of prejudice, defendant has been denied his right to a speedy trial and the prosecution must be dismissed." *State* v. *Johnson,* 275 N.C. 264, 277, 167 S.E.2d 274, 283 (1969) (emphasis added).

The circumstances of each case are controlling but factors to be considered by a court in determining whether an accused has been deprived of a speedy trial are (1) the length of the delay, (2) the cause of the delay, (3) waiver by the defendant and (4) prejudice to the defendant. *State* v. *McKoy,* 294 N.C. 134, 240 S.E.2d 383 (1978). *State* v. *Johnson, supra.* In this case, defendant has not shown a deliberate and unnecessary delay caused by the State resulting in a reasonable possibility of prejudice to defendant.

The only possible prejudice shown by defendant at the hearing on the motion was that all records for the varied companies and partnerships he was involved in were lost when the building owner repossessed the business office for all the companies sometime in July or August of 1973. This loss of evidence was not caused or in any way contributed to by the handing down of an indictment in early 1978.

For the first three years of this time span, defendant gave assurance to his alleged victims that the money was safely invested. Not until February of 1976 was any official of the State of North Carolina informed of or complained to in regard to the Poindexter and Belton investments. In September, 1976, the local district attorney received the information and contact was made with defendant. In early November, 1976, he promised the district attorney he would repay the money and was given thirty days to do so. Thus, until early December, 1976, any delay in bringing defendant to trial lies squarely on his shoulders.

In April of 1977, ancillary to an investigation of another set of corporations and partnerships in which defendant was involved, information the local district attorney had on the Poindexter and Belton investments was turned over to the White Collar Crime Unit of the SBI. Because of a heavy caseload, this unit did not begin investigating these particular embezzlements by defendant until October, 1977. Bank records involving the Poindexter and Belton payments were not received until January of 1978. Indictments were brought

the next month. The only possible prejudicial delay of these facts was from December, 1976, a time by which defendant was to repay the investors, until February, 1978, a period of little more than a year which was not a period constituting prejudicial delay in defendant's case. It was a reasonable period for investigation particularly in light of the many and varied business and legal entities surrounding defendant.

Thus, looking at the four factors we are to consider according to *State* v. *McKoy, supra,* and *State* v. *Johnson, supra,* the facts and circumstances of this case present the following: (1) the length of the delay because of defendant's own assurances that he would repay was not a period of five years but really little more than a year; (2) defendant's own promises of repayment along with a heavy SBI caseload the the complicated nature of this case caused the delay; (3) the defendant's own assurances constituted a waiver of most of the time span when an indictment could have been brought and (4) no prejudice has been shown by defendant.

> "The burden is on an accused who asserts the denial of his right to a speedy trial to show that the delay was due to the neglect or willfulness of the prosecution. A defendant who has himself caused the delay, or acquiesced in it, will not be allowed to convert the guarantee, designed for his protection, into a vehicle in which to escape justice." *State* v. *Johnson,* 275 N.C. at 269, 167 S.E.2d at 278; *see also State* v. *Wright,* 290 N.C. 45, 224 S.E.2d 624 (1976), *cert. den.,* 429 U.S. 1049, 50 L.Ed.2d 765, 97 S.Ct. 760 (1977).

The trial court properly denied the motion.

Defendant's other assignment of error deals with the jury instruction on the definition of fiduciary. Defendant was charged with embezzlement in violation of G.S. 14-90 which provides:

> "If any person exercising a public trust or holding a public office, or any guardian, administrator, executor, trustee, or any receiver, or *any other fiduciary,* or any officer or agent of a corporation, or any agent, con-

> signee, clerk, bailee or servant, except persons under the age of sixteen years, of any person, shall embezzle or fraudulently or knowingly and wilfully misapply or convert to his own use, or shall take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever belonging to any other person or corporation, unincorporated association or organization which shall have come into his possession or under his care, he shall be guilty of a felony, and shall be punished as in cases of larceny." (Emphasis added).

The words "or any other fiduciary" were added by amendment in 1939 to enlarge the scope of the statute after a restrictive reading by the Court in *State* v. *Whitehurst,* 212 N.C. 300, 193 S.E. 657 (1937) and *State* v. *Ray,* 207 N.C. 642, 178 S.E. 224 (1935). *See State* v. *Ross,* 272 N.C. 67, 157 S.E.2d 712 (1967). Embezzlement in violation of this statute is made up of four elements: (1) the defendant must be the agent of the prosecutor; (2) by terms of his employment, office or other fiduciary relationship he was to receive the property of his principal; (3) that he received the property in the course of his employment, office or other fiduciary relationship and (4) knowing it was not his own, he converted it to his own use or fraudulently misapplied it. *See, e.g., State* v. *Ellis,* 33 N.C. App. 667, 236 S.E.2d 299, *cert. den.,* 293 N.C. 255, 236 S.E.2d 708 (1977). In this case, defendant was in a fiduciary relationship. He was a promoter of a limited partnership in which the prosecutors of this case, Poindexter and Belton, invested. Behind a corporate front, he was in charge of investing the money in real property. He received and deposited their money in the account of a corporation of which he was secretary-treasurer and which he had designated to be general partner for the limited partnership. The money was not invested as promised and was not returned to those

who invested it. Defendant's promises, promotions, receipt and disbursement of money, and his position in American Marketing Corporation gave him a fiduciary relationship with the investors. the funds was misapplied before the partnership was formed. No partnership property was embezzled. The investments of Poindexter and Belton were instead embezzled and they were embezzled by one in a fiduciary relation to them. *See* Annot. 82 A.L.R.3d 822, 851-54 (1978). Defendant's actions were encompassed in the "any other fiduciary" part of the statute.

"Fiduciary" thus became a crucial term in the case. The trial court instructed "a fiduciary is defined in law as a person having a duty created by his undertaking to act primarily for another's benefit." This definition was adequate for the case. Courts have been hesitant to define the term as is the case with the term "fraud" for fear one may escape the consequences of his actions for failure to meet a technical definition. We reecho this today and in approving the trial court's wording by no means declare its wording the definition of fiduciary. Our Courts have said:

> "The relation may exist under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence. 'It not only includes all legal relations, such as attorney and client, broker and principal, executor or administrator and heir, legatee or devisee, factor and principal, guardian and ward, partners, principal and agent, trustee and *cestui que trust,* but it extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other.' " *Abbitt* v. *Gregory,* 201 N.C. 577, 598, 160 S.E. 896, 906 (1931) (citations omitted).

The wording of the instruction in this case was similar to this and adequate.

No error.

WEBB and HARRY C. MARTIN, JR., concur.

EXHIBIT B

SUPREME COURT OF NORTH CAROLINA

Fall Term 1979

STATE OF NORTH CAROLINA

v.

WAYNE SEAY

Judgment Dismissing Appeal On Motion Of Attorney General And Denying Petition For Discretionary Review

(7921SC647)

(filed February 15, 1980)

This matter came on to be considered upon defendant's notice of appeal from the North Carolina Court of Appeals, pursuant to G.S. 7A-30, upon the Attorney General's motion to dismiss the appeal for lack of a substantial constitutional question, and upon defendant's petition for discretionary review of the decision of the North Carolina Court of Appeals, pursuant to G.S. 7A-31; upon consideration whereof, it is adjudged by the Court in conference this 6th day of February 1980 that the motion to dismiss the appeal be allowed, that the petition for discretionary review be denied, and that it be so certified to the North Carolina Court of Appeals.

It is considered and adjudged further that the defendant do pay the sum of NINE AND NO/100 DOLLARS ($9.00) and execution issue therefor.

This Court's order of 9 January 1980 temporarily staying execution of judgment is dissolved.

/s/ CARLSON, J.
Carlson, J.
For the Court

The foregoing order is issued over my hand and the seal of the Supreme Court this 14th day of February, 1980.

/s/ JOHN R. MORGAN
John R. Morgan
Clerk of the Supreme Court
of North Carolina

cc: North Carolina Court of Appeals
David S. Crump, Special Deputy Attorney General
Morrow, Fraser & Reavis, Attorneys at Law
Donald K. Tisdale, District Attorney
A. E. Wellburn, Clerk of Superior Court

Supreme Court, U. S.
FILED
JUL 21 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1761

WAYNE SEAY
Petitioner,

v.

STATE OF NORTH CAROLINA
Respondent.

ON APPLICATION FOR CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSTION TO CERTIORARI

RUFUS L. EDMISTEN
Attorney General

JAMES F. BULLOCK
Sr. Deputy Attorney General

DAVID S. CRUMP
Special Deputy Attorney General
Special Assistant to the Attorney General

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1761

WAYNE SEAY
Petitioner,

v.

STATE OF NORTH CAROLINA
Respondent.

ON APPLICATION FOR CERTIORARI TO THE
SUPREME COURT OF NORTH CAROLINA

BRIEF IN OPPOSTION TO CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion of the North Carolina Court of Appeals affirming Petitioner's conviction on two counts of embezzlement is reported, *State v. Seay*, 44 N.C. App. 301, 260 S.E. 2d 786 (1979). The North Carolina Supreme Court's dismissal of Petitioner's appeal and dismissal of his petition for discretionary review are reported in 299 N.C. 333, _____ S.E. 2d _____ (1980).

II.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner asserts denial of his rights under the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States. Also relevant is the Fourth Amendment to the Constitution of the United States and N.C. Gen. Stat. §§15A-701 to - 704. Respondent admits that no statute of North Carolina bars the prosecution of a felony, *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969); N.C. Gen. Stat. §15-1. North Carolina has adopted a "Speedy Trials Act," N.C. Gen. Stat. §§15A-701 to - 704, but that law grants rights which attach upon accusation, *State v. Rice,* 46 N.C. App. 118, _____ S.E. 2d _____ (1980).

III.

QUESTIONS PRESENTED

1. Whether the lapse of time alone, a period of about fifteen months, from the time that prosecuting agencies had reasonable grounds to believe that a criminal offense may have been committed until the Petitioner's indictment, violates his right to a speedy trial when the Petitioner's proof of prejudice fails.

2. Whether the right to a speedy trial is a personal right such that the Petitioner must show prejudice arising from delay in order to secure dismissal of the indictment.

IV.

STATEMENT OF THE CASE

The State relies on the Petitioner's assertion (Petition p. 3) that a copy of the record of the hearing on the motion to dismiss (R pp 1-43 in the North Carolina Court of Appeals) has been filed with the Clerk.

Wayne Seay was secretary-treasurer of American Marketing Company, Inc. and Robert McLawhorn was president of the corporation on April 2, 1973 (R p 13). In his capacity as secretary-treasurer of the corporation Mr. Seay received from Roger Franklin Tise a check from Mr. James Belton made payable to the order of American Marketing Corporation, General Partner, in the amount of four hundred ($400.00) dollars dated April 2, 1973. Furthermore, Mr. Seay received on April 6, 1973 a Northwestern Bank draft in the name of Inez Poindexter for five hundred ($500.00) dollars (R p 15).

Inez Poindexter testified (R p 20) that on April 6, 1973 she made out a check to American Marketing Company. Approximately six months later she talked with Wayne Seay. Subsequently Mrs. Poindexter contacted the Attorney General's office and the Secretary of State. She received a response from the Consumer Protection Division of the Attorney General's Office[1] dated April 8, 1976 and a response from the Securities Deputy of the Secretary of State's

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[1]The Attorney General of North Carolina has established a Consumer protection Division to enforce N.C. Gen. State. §75-1.1, North Carolina's "little FTC Act." There are no criminal sanctions for violation of N.C. Gen. Stat. §75-1.1, see N.C. Gen. State. §75.6.

Office[2] dated September 7, 1976 (R p 21). She was advised by the letter from the Secretary of State's Office to contact her District Attorney. She then talked with District Attorney Tisdale sometime in September of 1976 (R p 21).

Mrs. Poindexter made contact with Mr. Seay over the telephone on several occasions from April of 1973 through April or May of 1974. She was assured by the defendant that the defendant was "working on it and things was going to go and he thought it would be a good thing" (R p 23). Mrs. Poindexter also talked to Mr. Seay after having written to the Attorney General's Office (R p 23). She further testified that throughout this time she had no reason to believe that her money was not invested as Mr. Seay had told her that it was. In 1977 she was contacted by Mr. Daniels of the State Bureau of Investigation (R p 24).

James Belton testified that he had invested on April 2, 1973 through Roger Tise (R p 24). Belton did not make contact with any official concerning his investment until

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[2]Mr. William Coppedge, now retired, was for many years the Deputy Secretary of State who was responsible for enforcing North Carolina's securities laws, such as the "Blue Sky" law, Securities Dealers Registration law, and Tender Offer Act, Chapters 78A and 78B of the North Carolina General Statutes. The Secretary of State has no power to initiate a criminal prosecution.

the fall of 1976 when he wrote the State Bureau of Investigation (R pp 24, 25).[3]

District Attorney Tisdale testified that he saw Mrs. Poindexter on September 15, 1976 at which time she discussed with him the investment that she had made in Salem Properties (R p 26). District Attorney Tisdale attempted to call Mr. Seay and dictated a letter to Mr. Seay on or about that date (R p 28). The letter is quoted at R p 81 as follows:

> "Dear Mr. Seay: I met with Mrs. E. B. Poindexter yesterday in regard to a consumer protection complaint which she had against you and American Marketing Corporation (Salem Properties). It seems that Mrs. Poindexter has received little satisfaction or explanation from you concerning her investment with your company and she raises serious questions which should be answered. This may just be a misunderstanding and a lack of communication. However, I think that I can help in this matter if you would care to make an appointment to see me and discuss this matter. If you do not want to discuss the matter, then I will have no other recourse than turning it over to our investigators to do a thorough study as to whether

---

[3]North Carolina's State Bureau of Investigation is a criminal investigative and law enforcement agency, N.C. Gen. Stat. §114-12, to - 14. The Attorney General of North Carolina is the Secretary of the Department of Justice of which the State Bureau of Investigation is a part, N.C. Gen. Stat. §143A-49 et seq. Mr. Daniels is sworn as a law enforcement officer through the State Bureau of Investigation and assigned to the Attorney General's Special Investigations Unit, 12 NCAC 2F .0401 et seq. The State Bureau of Investigation has no "original jurisdiction" to initiate a criminal investigation, subject to a few exceptions, N.C. Gen. Stat. §114-14; 12 NCAC 3 .0204, none of which are applicable in this case.

there should be criminal charges brought. We receive numerous complaints from consumers, many of which are unfounded. However, there are those that do have some merit and fact of which actions have been brought. I would hope that this is just a misunderstanding between the parties, and that it might be resolved."

It was the District Attorney's understanding at the time that he had talked with Mrs. Poindexter that there was a misunderstanding or lack of communications between Mrs. Poindexter and Mr. Seay (R p 26). Following the District Attorney's meeting with Mrs. Poindexter and his sending the letter to Seay, he received a telephone call from Seay (R pp 28-29). Seay assured the District Attorney that he intended to repay Mrs. Poindexter and asked the District Attorney if he would give 30 days in which to do so (R p 29). At that time the District Attorney had referred Mrs. Poindexter to a private attorney.

On April 26, 1977 a meeting was held with the District Attorney, a member of his staff, members of the staff of the Attorney General's Office and Mr. DeGraw, Mrs. Poindexter's attorney, to discuss another white collar type crime investigation involving Wayne Seay and corporations other than American Marketing and Salem Properties (R pp 30-31). As a result of that meeting an attorney with the Attorney General's Office expressed the opinion that "he did not see any obvious criminal violation" (R p 31) at that time. The District Attorney, the only official who could prosecute this violation did not know that the investigation had been completed "until the indictment was signed" (R p 33).

Ernest J. Daniel, Jr. of the State Bureau of Investigation testified that he received certain information concerning Mr. Wayne Seay and Salem Properties at the April 27, 1977 meeting and that he had commenced investigation on October 24, 1977 (R p 35). Intensive investigation did not begin until November 22, 1977 (R p 36). On January 11, 1978 Agent Daniel obtained court orders to the Northwestern Bank and Bank of North Carolina to obtain records of financial transactions. He received this information approximately January 24 (R p 37). The indictments were filed on February 28, 1978 (R pp 4; 9). Orders for arrest were served on the defendant on March 23, 1978 (R pp 7;11).

While Petitioner testified that he did not know where the corporate books and records of American Marketing Corporation and Salem Properties were located because the books and records were taken when the companies were evicted for non-payment of rent from the Wachovia Bank Building, (R p 13), the building manager testified (R pp 40-41) that the only records in the office were promotional brochures.

V.

REASONS WHY THE WRIT SHOULD NOT ISSUE

THE ISSUE WHICH PETITIONER SEEKS TO PRESENT HAS BEEN HERETOFORE DECIDED BY THIS COURT AND THE DECISION OF THE NORTH CAROLINA COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S PRIOR DECISIONS.
(Supreme Court Rule 19)

The decisions of this Court clearly establish that the Petitioner has received the speedy trial and the due process to which he is entitled in the circumstances of this case. Both in the State appellate proceedings and in his Peitition to this Court the Peititioner has relied on a series of decisions in this Court and one decision of the North Carolina Supreme Court. Analysis of the facts and rationales of these decisions demonstrates, the State contends, that no Federal right of the Peititioner has been abridged and that no sound reason exists to interpret the Fifth, Sixth and Fourteenth Amendments as broadly as Peititioner would desire.

In *United States v. Ewell,* 383 U.S. 116 (1965) this Court held that a lapse of 19 months between arrest on one charge and hearing on indictments based on the same events, where the appellees had secured orders vacating their pleas of guilty to the first warrants, did not violate their right to a speedy trial. The Court recognized that the bulk of the delay was a result of the appellees' successful prosecution of their §2255 motions. The Court reasoned that the interval created the same problems for the Government as for the appelles, as the Government was required to prove guilt beyond a reasonable doubt. The Sixth Amendment requires "orderly expedition and not mere speed," citing *Smith* v. *United States,* 360 U.S. 1, 10 (1959) and does not amount to a deprivation of rights unless "purposeful or oppressive," delay is shown, *Pollard* v. *United States,* 352 U.S. 354, 361 (1957).

United States v. Marion, 404 U.S. 307 (1971) dealt with an interval of three years between the alleged occurrence of the criminal acts and the filing of indictments. No evidence was submitted on the motion

to dismiss; no prejudice was claimed or demonstrated. The District Court dismissed, holding that the Government must have been aware of the relevant facts three years prior to the indictments. This Court reversed, holding that the Sixth Amendment right attaches upon accusation; indictment, in that case being the accusation, see 404 U.S. at 315, note 8.

The Court also addressed the relevance of statutes of limitation, quoting from *United States v. Cadarr,* 197 U.S. 475, 478 (1905): "[a]t the common law, and in the absence of special statutes of limitations, the mere failure to find an indictment will not operate to discharge the accused from the offense nor will a *nolle prosequi* entered by the government, or the failure of the grand jury to indict."

The Court carefully analyzed the evils against which the speedy trial guarantee protects, saying that those evils exist apart from actual or possible prejudice to an accused's defense. The Fifth Amendment would require dismissal if the defendant showed at trial that the pre-indictment delay caused substantial prejudice to the defendant's rights to a fair trial and that the delay was an intentional device to gain a tactical advantage over the accused.

In *Dillingham v. United States,* 423 U.S. 64 (1975) this Court held that a 22 month interval between arrest and indictment followed by a 12 month interval between indictment and trial counted together amounted to denial of a Sixth Amendment right. In short, arrest constitutes an "accusation" within the meaning of the Amendment.

United States v. Lovasco, 431 U.S. 783 (1977) addressed an interval of 18 months between the date on which the offenses of possession of firearms stolen from the United States mails and dealing in firearms without a license were alleged to have occurred and the filing of the indictment. The District Court heard defendant's motion to dismiss, which was grounded on claims that the delay was unnecessary and a claim that his defense had been prejudiced.

This Court analyzed the Due Process claim by saying, 431 U.S. at 790: " . . . proof of prejudice is generally a necessary but not sufficient element of a due process claim, and . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused."

The Court then analyzed at length the reasons that it would be contrary to the best interests of prosecutors, the accused, law enforcement officials, the courts and the interests of public justice to require the Government to file charges promptly upon obtaining sufficient evidence to prove guilt beyond a reasonable doubt. The Court held that to prosecute a defendant following investigative delay does not deprive him of due process, *even if his defense might have been somewhat prejudiced by lapse of time.*

The state case on which Petitioner relies is *State v. Johnson,* 275 N.C. 264, 167 S.E. 2d 274 (1969). In *Johnson* the appellant was tried on an indictment returned at the November 1967 Session of Nash County Superior Court charging that the appellant had committed robbery and aggravated assault on 25 October 1963. The evidence on the motion to dismiss showed that the Sheriff of Nash

County obtained warrants on 1 November 1963 charging Johnson with the offenses alleged in the November 1967 indictments. The Sheriff took the warrants to the adjacent county of Wilson where Johnson was held on unrelated charges. The Sheriff read the warrants to Johnson, but did not serve them or arrest him on them. Johnson never demanded trial on the Nash warrants.

The North Carolina Supreme Court, in what has been called a "pioneering" decision, Note, "The Potential Defendant's Right to a Speedy Trial," 48 N.C.L. Rev. 121 (1969), relying on concepts of due process and speedy trial, held that where there had been an atypical delay in securing a warrant or an indictment and the defendant showed (1) that the prosecution deliberately and unnecessarily caused the delay for the convenience or supposed advantage of the State and (2) that the length of the delay created a reasonable possibility of prejudice, defendant has shown denial of a right to a speedy trial and the prosecution must be dismissed.

There are several points to be made about the *Johnson* decision. It is unclear from the opinion whether the North Carolina Court relied on Article I, §19 (the "law of the land" or due process clause) of the Constitution of North Carolina or on the Sixth and Fourteenth Amendments. The Federal decisions relied upon in *Johnson* (and from which the Petitioner seems to draw particular comfort) were characterized in *United States v. Marion, supra,* at footnote 8 as a "unique line of cases in the District of Columbia Circuit concerning pre-indictment delay in narcotics cases where the Government relies on secret informers and (frequently) on single transactions." This Court said of

those cases, including *Ross v. United States,* 121 U.S. App. D.C. 233, 349 F 2d 210 (1965) that they are based on the court's "purported supervisory jurisdiction." When *Johnson* is read against the background of the decisions of this Court it is most properly understood as an extension of the subsequent decision in *Dillingham v. United States, supra,* as constituting, under North Carolina law, a person against whom a warrant has been issued an "accused" within the meaning of the guarantees. The *Johnson* case is thus broader than the decisions of this Court in its application of the right. Both North Carolina appellate courts have held that this Petitioner has failed to bring himself within the protections of the application or the even yet broader dicta of this North Carolina rule.

Johnson, in connection with the cases decided in this Court, establish the irrelvance of the absence of a statute of limitations on felonies in North Carolina law, see 264 N.C. at 269; see also the four factor test adopted by the North Carolina Court, *State v. Johnson, supra,* followed, *State* v. *McKoy,* 294 N.C. 134, 240 S.E. 2d 383 (1978).

The test to be applied, under the decisions of this Court, then, is whether the Petitioner has shown (1) prejudice and (2) that the delay was an intentional device to gain tactical advantage over him, *United States v. Lovasco, supra; United States v. Marion, supra.*

Petitioner's claim of prejudice, a "necessary but not sufficient," *United States v. Lovasco, supra,* showing, is based on a very thin record. At the pretrial hearing he asserted that he did not know where the books and records of American Marketing and Salem Properties

were located; that they were taken by the landlord when the companies were evicted for non-payment of rent (R p 13). Yet the Peititioner's own witness, Lester R. Burnette, the building manager, testified that the only corporate records found when the managing agent of the office building foreclosed was some promotional brochures (R p 41). Furthermore, Petitioner's only witness, Robert T. McLawhorn, read before the jury a purported letter from Seay to Tise, the salesman, which instructed Tise on the repayment of the investments which he had solicited (R p 88).

Petitioner's defense was that he had repaid the investors (R pp 14-15). The corporate books and records which would have established that defense were the banking records of the companies and the letter which McLawhorn read before the jury. Microfilm copies of the bank records became available to the State on January 24, 1978, after Agent Daniels got a search warrant for them (R p 37). Those same records would have been available to Seay or McLawhorn upon payment of the banks' copying charge. Thus the claim of prejudice is attenuated, at best, and the North Carolina courts had more than ample reason to reject it.

If there is any showing of any delay or lapse of time for the convenience of the State, that lapse of time is from April 27, 1977 to October 24, 1977, a period of less than seven months (R pp 35; 37-38). During the period from October 24, 1977 when "investigation" (R p 35) began, through November 22, 1977 when "intensive investigation" began, through January 11, 1978 when search warrants were obtained (R p 37) through January 24, 1978, when the bank records were received (R p 37) the State had *no* proof that the Petitioner had " . . .

embezzle[d] or fraudulently or knowingly and wilfully misappl[ied] or convert[ed] to his own use any money,. . . check, . . . belonging to any other person . . . " N.C. Gen. Stat. §14-90. Indictments, the first formal "accusation," issued on 27 February 1978 (R pp 4; 7-8) and were served on March 23, 1978 (R pp 7; 11). Trial began April 17, 1979 (R pp 1; 44), after denial of defendant's motion to dismiss, heard on May 31, 1978 (R pp 1; 44). In this case defendant bases none of his claim on post-indictment or post-arrest lapse of time or delay. No information came to the attention of any official of the State who had a legal duty to prosecute or investigate prior to September 15, 1976 (R p 26 and notes 1-3, this Brief) and he had no reason to request further investigation prior to, at the earliest, November 1, 1976 (R p 32). "Intensive investigation" (R p 36) was begun by responsible officials about a year later. The period of September 15, 1976 (the meeting of the District Attorney with the complainant Poindexter) to November 1, 1976 (thirty days after Petitioner promised repayment) is attributable to Petitioner and his false assurances of repayment.

On this record it is apparent that Petitioner would have the Court establish a right expressly rejected in *Hoffa v. United States,* 385 U.S. 293 (1966) where this Court said:

> "There is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and a violation of the Sixth Amendment if they wait too long. Law

> enforcement officers are under no constitutional duty to call a halt to a criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."

The Petitioner cites no authority whatsoever for the assertion that the State or the Government should be required to prove that the interval between the occurrence of the crime and indictment is not prejudicial. The reasons are obvious: (1) No such authority exists and (2) the whole record here repudiates his claim. At all events, the claimed right is personal c.f., *Gannett v. DePasquale,* 443 U.S. 368 (1979) and the heretofore cited decisions of this Court place the burden on the defendant. So allocating the burden is completely fair because: (1) the claim is in the nature of a plea of confesson and avoidance, *United States v. Marion,* 404 U.S. at 312; (2) the difficulties of proof of a negative are well known to and often discussed by this Court, e.g., *Mullaney v. Wilbur,* 421 U.S. 684 (1975); (3) the facts establishing prejudice are far more likely to be known by the defendant than by the Government or the State; (4) the showing of prejudice is a necessary but not alone sufficient showing in avoidance, *United States v. Lovasco, supra;* and (5) unlike the situation in *Mullaney, supra,* no burden of proof of a negative of a common law element of a substantive crime is fashioned into the defense of a charge; the State retains the full burden of proof of the offense.

The Petitioner's assertions that District Attorney Tisdale lied in his testimony before the jury require only

the answer that the Petitioner may seek indictments for perjury if such is the case. The fact that the District Attorney was the witness will not hamper Petitioner's ability to seek such indictments since North Carolina does not allow the District Attorney to appear before the grand jury in any capacity, N.C. Gen. Stat. §§15A-623 to - 626, and because North Carolina freely allows one claiming to be a victim of crime to employ private prosecution, see Note "Private Prosecution" 50 N.C.L. Rev. 1171 (1972).

Where in a criminal trial the defense elects to offer evidence, rather than relying on the weaknesses of the State's case, it is to be expected that conflicts will arise in some particulars of the evidence.

VI.

CONCLUSION

This record shows that the Petitioner has not shown any convincing claim of prejudice, nor has he shown any significant delay attributable to the convenience, lack of good faith or attempt to gain tactical advantage by the State. He has failed to qualify under a State court created test far more advantageous to him than any ever adopted by this Court. Further review of his trial and conviction are useful only if the Court desires to repudiate *Hoffa v. United States, supra; United States v. Marion, supra;* and *United States v. Lovasco, supra.* The writ should not issue.

Respectfully submitted this the 21st day of July, 1980.

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CERTIFICATE OF SERVICE

I, David S. Crump, Special Deputy Attorney General, North Carolina Department of Justice, do hereby certify that I have this day served three copies of the foregoing Brief in Opposition to Certiorari upon the following by depositing a copy of same in the United States mail, postage prepaid:

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This the 21st day of July, 1980

David S. Crump
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No. 79-1761

IN THE

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OCTOBER TERM, 1979

STATE OF NORTH CAROLINA

v.

WAYNE SEAY

On Appeal From The North Carolina Supreme Court

REPLY TO OPPOSITION TO PETITION

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

IN THE

Supreme Court of the United States

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No. 79-1761

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Pursuant to Rule 22 of the Rules of the Supreme Court, the Petitioner files this Supplemental and Reply Brief to apprise the Court of a recent case not decided at the time of the filing of the Petition, and to reply in part to new matters raised by the State in its Brief.

In *United States* v. *MacDonald,* _____ F.2d _____, (4th Cir., July 29, 1980)*, the Fourth Circuit Court of

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* Prior to trial, MacDonald took an interlocutory appeal and prevailed on the speedy trial issue, but this Court reversed and held that the matter was not ripe for review prior to trial. *United States* v. *MacDonald,* 531 F.2d 196 (4th. Cir. 1976), reversed on prematurity grounds, 435, U.S. 850 (1978).

Appeals reversed the triple murder conviction of defendant on Six Amendment grounds because of a pre-indictment delay of twenty-six months.

During this critical twenty-six month period, defendant MacDonald was not under arrest, indictment, or other formal charge, but the case was under investigation.

Such is the case of the petitioner, where there was a delay of over two (2) years prior to the indictment, but during which time the case was under investigation by various agencies of the State of North Carolina.

While defendant MacDonald had earlier been arrested, it is significant the arrest warrant had been dismissed early on, and the twenty-six month delay which the Court deemed crucial occurred *during this interval.* What is more significant is that the Court held:

> [t]he Six Amendment. . .secures. . .rights to a speedy trial *against oppressive conduct by the government in its single sovereign capacity,* regardless of the name of the manner and character of the executive departments that participate in the prosecution.

In the case at bar, petitioner was investigated continuously during the two year period by the Attorney General's Office of the State of North Carolina, the North Carolina State Bureau of Investigation, the Secretary of the State of North Carolina, and the District Attorney of North Carolina.

The importance of the unexcusable twenty-six (26) month delay in *United States* v. *MacDonald, supra,* and why the court declared it controlling, is that the delay contributed to the "anxiety and concern" of the defendant an interest which achieved constitutional

stature in this Court's opinion in *Barker* v. *Wingo,* 407 U.S. 514 (1972).

The Fourth Circuit has twice held that the pre-indictment delay in *United States* v. *MacDonald, supra,* required dismissal of the indictments. The petitioner suggests that the logic and decisions of the court in *United States* v. *MacDonald, supra,* should be followed by this Court.

It should be noted that the State's Brief in Opposition to the Petition for Writ of Certiorari states, at Page 16, that the petitioner may seek indictments for perjury against the district attorney regarding his testimony at the trial if he feels that the district attorney has been untruthful, and that Petitioner could employ private prosecution for such purpose.

Petitioner would point out that a defendant who is convicted, in part, on the allegedly perjured testimony of the district attorney ought not to have as his exclusive remedy a perjury indictment against the witness to correct the wrong. Such a response by the State represents the cavalier concern of the State for the petitioner's constitutional rights that permeates this entire record and should not be sanctioned by this Court.

N.C.G.S. 15A-626, to which the State makes reference, states that the district attorney provides that witnesses are to be called before the grand jury, and that *the district attorney, in his discretion, may call or refuse to call* any witness the foreman of the grand jury requests the district attorney to call as a witness pursuant to G.S. 15A-626(b).

Petitioner knows of no authority by which one could retain a private prosecutor *without* the district attorney's consent. Certainly, the State cites no cases in which a private prosecutor can submit witnesses to the grand jury.

A grand jury may make a written accusation on its own motion, a presentment, but a presentment by statute does not constitute a criminal proceeding, and it requires the district attorney to submit a bill of indictment to the grand jury only "when it is appropriate to do so." N.C.G.S. 15A-641. This obviously leaves the discretion of what is "appropriate" to the district attorney. This is contrary to the practice in many states in which the grand jury does not need the agreement of the district attorney to issue a presentment.

An information is a written accusation by a district attorney charging a person represented by counsel with a crime. G.S. 15A-644. The grand jury has no authority to issue an information.

Clearly, then, the remedy that the State suggests is not only an inadequate remedy, it is no remedy at all.

CONCLUSION

For these additional reasons, the Petition should be granted.

Respectfully submitted,

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